**U.S. Department of Labor**

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

**Issue Date: 01 November 2005**

Case No: 2004-BLA-5365

In the Matter of

MARVIN RAY BROWN

Claimant

v.

SHARPLES COAL CORP.

Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

Gregory E. Hull, Esq.
MILLIKIN & FITTON LAW FIRM
Hamilton, OH
For the Claimant

Natalee A. Gilmore, Esq.
Jackson & Kelly PLLC
Lexington, KY
For the Employer

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* Under the Act, benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis, commonly known as black lung, is defined in the Act as "a chronic dust disease of the lung and its sequelae, including pulmonary and respiratory impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

On November 25, 2003, this case was referred to the Office of Administrative Law Judges for a formal hearing. (DX 32). The hearing was held in Cincinnati, Ohio on December 14, 2004. The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, applicable regulations, statutes, and case law. They also are based upon my observation of the appearance and demeanor of the witness who testified at the hearing. Both parties have submitted post-hearing briefs in this matter and they have also been considered. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been reviewed carefully, particularly those related to the Claimant's medical condition. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to "DX", "EX", and "CX" refer to the exhibits of the Director, Employer, and Claimant, respectively. The transcript of the hearing is cited as "Tr." and by page number.

The Notice of Hearing and Pre-hearing Order gave direction to the parties concerning the matters to be considered in the briefing of the issues involved in this case. The briefing order indicates as follows:

> Any ISSUE not specifically addressed on brief will be considered abandoned by that party for decisional purposes. Each party will make specific, all inclusive FINDINGS OF FACT with respect to each issue being briefed.
>
> All contentions concerning fact and law as to individual issues which are not made on brief will be considered waived. The absence of FACTUAL FINDINGS or

> arguments concerning record evidence will constitute an admission that they are of no importance in the disposition of the issue and that the party has abandoned any contention concerning the applicability of the ignored evidence to the pertinent issue.

The directive includes the warning that if a party fails to fully argue an issue or to make complete factual findings concerning that issue, that they have waived any consideration as to the argument or as to the facts, and have abandoned the matter in its entirety, both factually and legally, as a result of the omission.

The issues and facts being discussed in this opinion are those which have been raised by the parties. All other legal and factual contentions are considered abandoned.

## ISSUES

The following issues remain for resolution:

1. Whether Claimant has pneumoconiosis as defined by the Act and regulations;

2. Whether Claimant's pneumoconiosis arose out of coal mine employment;

3. Whether Claimant is totally disabled; and

4. Whether Claimant's disability is due to pneumoconiosis.

The Employer also contests other issues relating to the constitutionality of the Act and regulations. These issues are beyond the authority of an administrative law judge and are preserved for appeal purposes only.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Factual Background and Procedural History

Claimant, Marvin Ray Brown, was born on December 16, 1946. (DX 2, Tr. at 10). He divorced his wife on January 28, 1997, and he does not support her. (*Id.*). He has completed two years of college and received some electrical vocational training. (DX 6). He had no children who were under eighteen or dependent upon him at the time this claim was filed. (DX 2).

Claimant testified that he started to experience breathing problems prior to leaving the coal mining industry. (Tr. at 15). He is being prescribed breathing medicine by his family physician, Dr. John Schuck. (*Id.* at 13-4). He has problems sleeping, so he sleeps on a couple of pillows. (*Id.* at 14). He was diagnosed with congestive heart failure in 1999. (*Id.* at 15). Dr. Stroggle is the physician who treats his heart condition. (*Id.*).

The record reveals some inconsistency regarding Claimant's smoking history. Claimant testified that he has smoked one pack of cigarettes a day from 1964 until approximately 2000 for a total of 36 years. (Tr. at 18). On May 2, 2003, Dr. Robert W. Powell examined Claimant and noted that he was a current smoker who has smoked one package of cigarettes a day since the age of 24 for a total of 33 years. (DX 9). Dr. James E. Lockey examined Claimant on August 7, 2003 and recorded a 30 year smoking history. (EX 2). On April 28, 2004, Dr. Lawrence Repsher also examined Claimant but noted a smoking history of one package of cigarettes a day for 31 years. (EX 3). Finally, Dr. P. Raphael Caffey reviewed Claimant's medical records and considered a 30 year smoking history. (EX 4).

In weighing the evidence regarding Claimant's smoking history, I find that the majority of the evidence supports a finding that Claimant smoked one package of cigarettes a day for 33 years.

Claimant filed his application for black lung benefits on February 9, 2003. (DX 2). The Office of Workers' Compensation Programs awarded benefits on September 22, 2003. (DX 24). Pursuant to Employer's request, the case was transferred to the Office of Administrative Law Judges for a formal hearing. (DX 32).

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. At the hearing, the parties stipulated that Claimant worked 14 years in qualifying coal mine employment. (Tr. at 8-9). Based upon my review of the record, I accept the stipulation as accurate and credit Claimant with 14 years of coal mine employment.

On Form CM-913, Claimant noted that he worked primarily at the face of the mine as a "working" mine foreman. (DX 4). He indicated that all of his time was on the production system. (*Id.*). This job required him to carry eight pound blocks a distance of 200 feet every day; operate a roof bolter; walk the belt lines everyday; and walk the escape ways at least once a week. (*Id.*). Claimant left the mining industry in 1986 after he was injured in a mining accident. (Tr. at 11). Sharples Coal Corp. was Claimant's last coal mine employer.[1] (*Id.*).

MEDICAL EVIDENCE

A claim filed after January 19, 2001, is subject to the revised regulations of Parts 718 and 725. These regulations impose two requirements on the submission of medical evidence. Initially, they require that the evidence be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §718.101 to 718.107. Secondly, the medical evidence must comply with the limitations of Sections 725.414, 725.456, 725.457, and 725.458. Regarding the initial evidence offered in support of entitlement to benefits, the regulations provide that claimants and responsible operators are limited to the submission of no more than two chest x-ray interpretations, two pulmonary function tests, two arterial blood gas studies, two medical reports, one report of each biopsy and one autopsy report. 20 C.F.R. § 725.414(a)(2)(i) and (3)(i). In addition, the regulations caution that x-ray interpretations, pulmonary function studies, arterial blood gas studies, autopsy or biopsy reports, and physician opinions contained in a medical report "must each be admissible" under Section 725.414(a)(2)(i), (3)(i) or (a)(4).

The regulations also provide limitations on medical evidence submitted in rebuttal of the opposing party's evidence. 20 C.F.R. § 725.414(a)(2)(ii) and (3)(ii). Each party may submit no more than one physician interpretation of each chest x-ray, pulmonary function study, arterial blood gas study, and autopsy or biopsy report submitted by the opposing party. 20 C.F.R. § 725.414(a)(2)(ii) and (3)(ii). A party may submit evidence rehabilitative of the evidence rebutted by the opposing party. The party is permitted to submit one "additional statement from the physician who originally interpreted the

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989)(*en banc*).

chest x-ray or administered the objective testing," or "from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." 20 C.F.R. § 725.414(a)(2)(ii) and (3)(ii).

Neither party objected at the hearing under Section 725.414 to the admission of proffered evidence. After a review of all medical evidence included in the record, I find no violations of the evidentiary limitations.

X-ray reports

| Exhibit | Date of X-ray | Date of Reading | Physician/ Qualifications | Interpretation |
|---|---|---|---|---|
| DX 14 | 04/30/03 | 05/02/03 | Powell/B | 2/1, No Pneumoconiosis |
| DX 13 | 04/30/03 | 05/22/03 | Gaziano/B | Quality Reading Only |
| EX 1 | 04/30/03 | 10/07/03 | Wiot/BCR, B | No Pneumoconiosis |
| EX 2 | 08/07/03 | 08/07/03 | Lockey/B | ½, No Pneumoconiosis |
| EX 3 | 04/20/04 | 04/28/04 | Repsher/B | No Pneumoconiosis |

"B" denotes a "B" reader and "BCR" denotes a board-certified radiologist. A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services (HHS). A board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. *See* 20 C.F.R. § 718.202(a)(ii)(C).

Pulmonary Function Studies[2]

| Exhibit/ Date | Physician | Age/ Height | $FEV_1$ | FVC | MVV | FEV1/ FVC | Tracings | Comments |
|---|---|---|---|---|---|---|---|---|

[2] As there is a discrepancy in the measured height of Claimant among the pulmonary function studies, I must make a finding resolving that discrepancy. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). There is no measured height that represents a majority; therefore, I shall average the heights. An average results in a height of 66.08 inches. Thus, I find Claimant's height to be 66.08 inches.

| Exhibit/ Date | Physician | Age/ Height | $FEV_1$ | FVC | MVV | FEV1/ FVC | Tracings | Comments |
|---|---|---|---|---|---|---|---|---|
| DX 11 04/30/03 | Powell | 56/ 65.75" | 1.35 | 1.78 | | 75.8% | Yes | Good Cooperation<br>Good Comprehension |
| DX 12 05/16/03 | Katzman | | | | | | | Reviewed study dated 04/30/03 and determined that it is acceptable. |
| EX 2 08/07/03 | Lockey | 56/ 66.5" | 2.17 *2.15 | 2.75 *2.69 | 55 | 78.9% *79.9% | Yes | Good |
| EX 3 04/20/04 | Repsher | 57/ 66" | 1.98 *2.10 | 2.65 *2.64 | | 74.7% *79.5% | Yes | |

Arterial Blood Gas Studies

| Exhibit | Date | Physician | pCO2 | pO2 | Resting/ Exercise |
|---|---|---|---|---|---|
| DX 10 | 05/02/03 | Powell | 38.2 | 70.8 | Resting |
| EX 2 | 08/07/03 | Lockey | 36 | 74 | Resting |
| EX 3 | 04/20/04 | Repsher | 40 | 79.8 | Resting |

Narrative Medical Evidence

Dr. Robert W. Powell, M.D., examined Claimant on May 2, 2003 and issued a report. (DX 9). He considered a 14 year coal mine employment history and noted that Claimant has smoked one package of cigarettes a day since he was 24 years old. He provided a full pulmonary workup, including a chest x-ray, a pulmonary function study, an arterial blood gas study, and an EKG. He diagnosed the Claimant with mild arterial hypoxemia based on the arterial blood gas study; interstitial lung disease and congestive heart failure based on an abnormal chest x-ray; cardiac dysthryhmia with implanted defibrillator; and diabetes. He noted that the etiology of Claimant's lung disease is uncertain. He concluded that Claimant has a moderate pulmonary impairment that would limit his ability to do sustained hard manual labor. Dr. Powell is board-certified in Internal Medicine and Pulmonary Disease.

Dr. James E. Lockey, M.D., examined Claimant on August 7, 2003 and issued a report. (EX 2). He considered a coal mine employment history of 13 years. He noted that Claimant worked as an underground mine foreman during the last year of his coal mine employment and smoked one package of cigarettes a day for 30 years. He provided a full pulmonary workup, including a chest x-ray, a pulmonary function study, an arterial blood gas study, and an EKG.

Dr. Lockey determined that there was insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. He suggested that Claimant's abnormal x-ray changes are consistent with idiopathic pulmonary fibrosis (IDF) and not pneumoconiosis. He stated that "coal workers' pneumoconiosis would be within the differential diagnosis but certainly not within the initial consideration based on available clinical data." He opined that Claimant has a pulmonary impairment but stated that it was typical of IDF. He determined that Claimant is totally disabled and unable to perform his previous coal mine employment or similar type work in a dust free environment. However, he opined that Claimant's impairment is not caused by pneumoconiosis. Dr. Lockey is board-certified in Internal Medicine, Occupational Medicine, and Pulmonary Disease.

Dr. Lawrence Repsher, M.D., examined Claimant on April 20, 2004 and issued a report on April 28, 2004. (EX 3). He considered a coal mine employment history of 14 years and noted that Claimant smoked one package of cigarettes a day for 31 years. He provided a full pulmonary workup, including a chest x-ray, a pulmonary function study, an arterial blood gas study, and an EKG. He found no evidence of coal workers' pneumoconiosis or a respiratory condition, either caused by or aggravated by coal dust. A CT scan was also taken of Claimant's chest that confirmed his finding of no pneumoconiosis.

Dr. Repsher diagnosed Claimant with severe coronary artery disease, severe cigarette addiction, and severe chronic low back pain. He opined that the results of the pulmonary function test indicate that Claimant has a mild restrictive disease, which he contends is explained by his severe left ventricular heart failure. He concluded that Claimant is suffering from severe underlying ischemic heart disease, which has been complicated by two prior heart attacks. He noted that Claimant's heart disease accounts for the abnormalities on his chest x-ray and pulmonary function tests. Dr. Repsher is board-certified in Critical Care, Internal Medicine, and Pulmonary Disease.

Biopsy Evidence

The record contains a Surgical Radiology Report of a transbronchial lung biopsy of the middle and right upper lobe dated June 10, 1994 from the Columbus Regional Hospital. (DX 15). On June 13, 1994, Dr. Greg Brown, M.D., diagnosed Claimant with mild interstitial fibrosis. Dr. Brown's medical specialty credentials are not of record.

Dr. P. Raphael Caffrey, M.D., reviewed Claimant's medical records and the eight surgical pathology slides of the Miner's lung tissue and issued a consultative report on August 12, 2004. (EX 4). He considered a coal mine employment history of 13 years and a smoking history of one package of cigarettes a day for 30 years. However, he noted that recent testing suggests that Claimant was smoking as of April 20, 2004. Upon microscopic examination of the lung tissue, he diagnosed Claimant with interstitial fibrosis. He also identified minimal amounts of anthracotic pigment. He concluded that there was no objective evidence to diagnose Claimant with coal workers' pneumoconiosis. Dr. Caffrey is board-certified in Anatomical and Clinical Pathology.

On brief, Claimant argues that Employer is attempting to avoid the evidentiary limitation rules for medical reports at Section 725.414(a)(3) by designating Dr. Caffrey's report as biopsy evidence. Claimant asserts that Dr. Caffrey's report should be excluded in its entirety because he reviewed significant medical evidence and the pathology slides when he rendered his opinion.

Employer submitted Dr. Caffrey's report as biopsy evidence under Section 20 C.F.R. § 725.414(a)(3)(i). Dr. Caffrey reviewed the eight surgical pathology slides and all the medical records in Claimant's file up to the date of his report prior to rendering his opinion. However, Dr. Caffrey's final diagnosis of the biopsy evidence is separate from his opinions relating to the other medical evidence he was asked to review and comment on by the Employer. (EX 4 at 2). Since Dr. Caffrey's discussion of the pathology slides can be severed from his report without affecting that doctor's opinion, it is not necessary to exclude his report in its entirety. *See* 20 C.F.R. § 725.457(d); *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (June 28, 2004) (en banc). Therefore, I will only consider Dr. Caffrey's final diagnosis of the microscopic examination of the biopsy evidence under Section 725.414(a)(3)(i).

Claimant also argues that Dr. Caffrey's deposition testimony is hostile-to-the-Act because his opinion is at odds with the basic premise that any amount of coal dust exposure is sufficient to cause coal workers' pneumoconiosis. Claimant's argument has no merit.

Dr. Caffrey testified that "it is possible in 13 years to develop the disease but certainly it is uncommon." (EX 7 at 14). Dr. Caffrey does acknowledge that a miner could develop pneumoconiosis with less than 13 years of coal mine employment. Since Dr. Caffrey's opinion does not foreclose all possibilities that a miner cannot develop pneumoconiosis with less than 13 years of coal mine employment, I find his statement to not be hostile-to-the Act. *See Chester v. Hi-Top Coal Co.*, BRB No. 00-1000 BLA (July 31, 2001)(unpub).

Deposition Testimony

Dr. Rephser was deposed on May 3, 2004. (EX 9). He affirmed the findings in his written report. He determined that the values obtained from Claimant's pulmonary function study dated April 30, 2003 indicate that he did not draw enough air into his lungs. He based this opinion on the flow curves produced as a result of the testing.

Drs. Caffrey and Lockey were both deposed. (EX 7 and EX 8). They essentially affirmed their findings made in their written reports.

Dr. Powell was deposed on December 1, 2004. (EX 5). He stated that Claimant's chest x-ray diagnosis of 2/1 was not a diagnosis of coal workers' pneumoconiosis. He opined that the abnormalities were likely due to interstitial lung disease or congestive heart failure. During his deposition, he reviewed a biopsy report by Dr. Greg Brown and concluded that Dr. Brown did not make a diagnosis of coal workers' pneumoconiosis. He stated that Dr. Brown did not note that he found any coal macules during the biopsy. He determined that Claimant's totally disabling respiratory impairment is not caused by coal dust and he determined that it is consistent with congestive heart failure and interstitial lung disease. He reviewed the results of Drs. Lockey and Repsher's pulmonary function studies and concluded that Claimant does not have a totally disabling respiratory impairment. Finally, he reiterated that Claimant does not have coal workers' pneumoconiosis or any lung disease caused by or aggravated by coal dust.

Hospital and Treatment Records

The record contains 148 pages of hospital records, progress notes, EKG reports, and lab results from the Jennings Family Care Center and the St. Vincent Jennings Hospital dating from July 9, 1999 to July 2, 2003. (EX 6). These records indicate that Dr. John Schuck treated Claimant for diabetes, chronic pain syndrome, coronary artery disease, depression, bronchitis, and ankle, neck, and back pains.

An x-ray was taken of Claimant's chest on April 12, 2002. (EX 6). Dr. Maureen Watson diagnosed pulmonary edema.

Dr. Richard Pitman issued a chest x-ray interpretation report on September 20, 2001. (EX 6). He diagnosed Claimant with pulmonary vascular congestion.

On April 16, 2002, Dr. Richard Hallett issued a chest x-ray interpretation report. (EX 6). He noted that Claimant has mild vascular congestion and interstitial edema.

Dr. Jon Bielefeld issued a chest x-ray interpretation report dated June 28, 2002. (EX 6). He noted that Claimant had no significant change in his cardiomegaly and interstitial edema.

On September 8, 2002, Dr. Anthony V. Zancanaro issued a chest x-ray interpretation report. (EX 6). He diagnosed Claimant with borderline cardiomegaly and congestive heart failure. He noted that some diffuse reticular opacity were present that could be chronic. An x-ray was taken of Claimant's chest on April 6, 2003. (EX 6). Dr. Zancanaro noted that the lungs were free of any active process.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. To establish entitlement to benefits under this part of the regulations, a claimant must prove by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d); *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989). In *Director, OWCP v. Greenwich Collieries, et al.*, 114 S. Ct. 2251 (1994), the U.S. Supreme Court stated that where

the evidence is equally probative, the claimant necessarily fails to satisfy his burden of proving the existence of pneumoconiosis by a preponderance of the evidence. A failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986) (en banc).

On brief, Claimant argues that he is entitled to benefits. He asserts that Dr. Powell was not "adequately familiar with Mr. Brown's actual exposure history to offer a valid opinion." In addition, Dr. Powell did not make a definite finding as to the etiology for his diagnosis of Mr. Brown's lung disease. Claimant finally contends that no weight should be given to Dr. Powell's opinion that Mr. Brown's impairment was not caused by coal dust.

Claimant also makes specific arguments that relate to the other medical experts' opinions of record. Claimant asserts that Dr. Lockey's diagnosis of IDF is inconsistent with the medical literature. He suggests that IDF is not a valid diagnosis where Claimant has established 14 years of coal mine employment. He also contends that Dr. Lockey never stated his diagnosis with the required degree of medical certainty.

Claimant also argues that Drs. Repsher and Lockey's opinions are contradicting because Dr. Repsher failed to diagnose Claimant with any form of pulmonary fibrosis but instead attributed any impairment to Claimant's heart disease.

Employer argues that Claimant has failed to establish that he has pneumoconiosis. Specifically, Employer asserts that the radiographic evidence of record is uniformly negative for pneumoconiosis. Employer also contends that the biopsy evidence does not support a finding of pneumoconiosis. Finally, Employer asserts that all of the medical opinions of record clearly establish Claimant does not have pneumoconiosis.

Employer also argues that Claimant has failed to prove that he has a totally disabling respiratory impairment. Specifically, Employer asserts that the majority of the pulmonary function and arterial blood gas evidence indicates Claimant is not totally disabled. Although Employer agrees that Dr. Powell's pulmonary function test was qualifying, Employer notes that Dr. Powell reviewed Claimant's recent tests and determined that he does not have a totally disabling respiratory impairment. Employer suggests that the credible medical opinions of Drs. Powell, Lockey, and Repsher all concluded that Claimant is not totally disabled.

Pneumoconiosis

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. In evaluating the x-ray evidence, I assign heightened weight to interpretations of physicians who qualify as either a board-certified radiologist or "B" reader. *See Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344, 1-345 (1985). I assign the greatest weight to interpretations of physicians with both of these qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128, 1-131 (1984). Because pneumoconiosis is a progressive disease, I also may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149, 1-154 (1989) (en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131, 1-135 (1986).

The record contains four interpretations of three chest x-rays. Of these interpretations, all four are negative for pneumoconiosis. Although Drs. Powell and Lockey noted opacities in Claimant's lung fields, neither doctor concluded that these abnormalities could support a finding of coal workers' pneumoconiosis or any dust related disease.

Claimant argues that "significant doubt" should be cast upon Dr. Wiot's negative x-ray interpretation. However, even if Dr. Wiot's report was given less weight, there are still no positive x-ray interpretations of record diagnosing coal workers' pneumoconiosis. Therefore, based on the above, I find that the x-ray evidence fails to establish pneumoconiosis under Section 718.202(a)(1).

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy evidence. The record contains a transbronchial lung biopsy from the Columbus Regional Hospital. Dr. Brown examined the lung tissue and diagnosed mild interstitial fibrosis. In order for a diagnosis to qualify as "pneumoconiosis," there must be evidence that the lung tissue has reacted to embedded coal deposits. Since Dr. Brown's report

contains no such discussion, I find his report does not support a finding of coal workers' pneumoconiosis.

Dr. Caffrey reviewed the surgical pathology slides and diagnosed Claimant with interstitial fibrosis. He found no evidence of macules, nodules, inflammation, or malignancy. He concluded that there was no evidence to diagnose coal workers' pneumoconiosis or any other dust induced lung disease. Although Dr. Caffrey noted a minimal amount of anthracotic pigment in his lungs, a finding of anthracotic pigmentation is not sufficient, by itself, to establish the existence of pneumoconiosis. *See* § 718.202(a)(2). Therefore, I find Dr. Caffrey's opinion to be well-documented and reasoned and entitled to full probative weight. As he is a pathologist, I assign his opinion additional weight.

In sum, I find Dr. Caffrey's well-reasoned and documented opinion not to support a finding of pneumoconiosis. I also find Dr. Brown's report to be unsupportive of a pneumoconiosis finding. Therefore, the biopsy evidence fails to establish pneumoconiosis under Section 718.202(a)(2).

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions apply to this claim, Claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides that a claimant may establish the presence of pneumoconiosis through a reasoned medical opinion. Although the x-ray evidence does not establish pneumoconiosis, a physician's reasoned opinion nevertheless may support the presence of the disease if it is explained by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993).

Dr. Powell examined Claimant and determined that there was insufficient evidence to diagnose pneumoconiosis or any dust related disease. He instead diagnosed Claimant with interstitial lung disease. He noted that the etiology of Claimant's lung disease is being of uncertain origin. He does

not explain how he ruled out coal dust exposure as the cause of Claimant's lung disease. I find Dr. Powell's opinion to be not well-documented and reasoned. A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. *Id.* An unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1986)(*en banc*). As such, Dr. Powell's unreasoned and undocumented report is entitled to less weight.

Dr. Powell also diagnosed Claimant with a mild arterial hypoxemia based on Claimant's arterial blood gas study. However, he does not list the etiology of the hypoxemia. A report is properly discredited where the physician does not explain how underlying documentation supports his diagnosis. *Duke v. Director,* OWCP, 6 B.L.R. 1-673 (1983). Therefore, for the reasons provided, Dr. Powell's opinion is entitled to less probative weight for this additional reason..

Dr. Lockey examined Claimant and determined that there was insufficient objective evidence to justify a diagnosis of legal or clinical pneumoconiosis. He diagnosed Claimant with idiopathic pulmonary fibrosis. However, he was unable to rule out coal dust as cause of Claimant's lung disease. I find that Dr. Lockey did not make a definite finding as to the etiology of Claimant's lung disease. An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). Since Dr. Lockey failed to make a definite finding as to the etiology of Claimant's lung disease, I assign his opinion less probative weight.

Dr. Repsher examined Claimant and concluded that Claimant did not suffer from clinical or legal pneumoconiosis. He based his opinion on the following: a thorough medical examination, a review of Claimant's medical records, and the results from the objective testing. I find Dr. Rephser's opinion to be well-reasoned and documented and entitled to full weight.

In sum, I find that Dr. Repsher's well-reasoned and documented opinion, which is supported by the lesser weighted opinions of Drs. Powell and Lockey, does not support a finding of pneumoconiosis. Since none of the medical reports of record state that Claimant suffers from clinical or legal pneumoconiosis, Claimant has failed to establish pneumoconiosis under Section 718.202(a)(4).

Additionally, as this claim is within the jurisdiction of the Fourth Federal Circuit, I must weigh all the medical evidence together under Sections 718.202(a)(1-4) to determine if Claimant has establish pneumoconiosis. *See Consolidation Coal Co. v. Director, OWCP [Held],* 314 F.3d 184 (4th Cir. 2002); I*sland Creek Coal Co. v. Compton,* 211 F.3d 203 (4th Cir. 2000). In weighing all of the relevant evidence together, I find that the record is devoid of any medical evidence establishing pneumoconiosis under Sections 718.202(a)(1-4). Therefore, Claimant has failed to establish pneumoconiosis under Section 718.202(a).

Total Disability

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. Additionally, the Administrative Law Judge is not required to consider a claimant's age, education, and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *See Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 B.L.R. 2-124 (6th Cir. 1985); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). Section 718.204(b) provides several criteria for establishing total disability. Under this section, I first must evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether Claimant has established total respiratory disability. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (ii), total disability may be established by qualifying pulmonary function studies or arterial blood gas studies. A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i), (ii). A "non-qualifying" test produces results that exceed the table values.

The record contains three pulmonary function studies. The pulmonary function test that Dr. Powell administered is qualifying. I must now determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director,* OWCP, 9 B.L.R. 1-154 (1986), and must

consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986).

The record shows that Claimant was administered two pulmonary function tests after he completed the test for Dr. Powell. Both of Claimant's subsequent tests, which were preformed four and eight months after Dr. Powell's test, are non-qualifying. More weight may be accorded to the results of a pulmonary function study which was taken at a later date. *See Schretroma v. Director,* OWCP, 18 B.L.R. 1-17 (1993). Additionally, during his deposition, Dr. Powell stated that Claimant either did a better job in the subsequent tests or his respiratory condition has improved enough to cause him to have better test results. Therefore, based on the above, I find Claimant's most recent pulmonary function studies to be a better representation of Claimant's current respiratory condition. As a result, Claimant has failed to establish total disability under Sections 718.204(b)(2)(i).

The record contains three arterial blood gas studies. None of the arterial blood gas studies is qualifying. As a result, Claimant has failed to establish total disability under Sections 718.204(b)(2)(ii).

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Under Section 718.204(b)(2)(iv), total disability may be established if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

Dr. Powell initially determined that Claimant was totally disabled based on his medical examination and the results of Claimant's pulmonary function study. He opined that Claimant's disability was caused by his congestive heart failure and lung disease. However, after he reviewed Claimant's most recent pulmonary function and arterial blood gas studies administered by Drs. Lockey and Repsher, he concluded that Claimant did not have a totally disabling respiratory impairment. I find Dr.

Powell's opinion to be well-reasoned and documented and entitled to full probative weight.

Dr. Lockey opined that Claimant was totally disabled and unable to perform his previous coal mine employment because of his reduced pulmonary capacity secondary to IDF and heart dysfunction. Dr. Lockey based his opinion on a thorough medical examination and review of Claimant's medical records. I find Dr. Lockey's opinion to be well-documented and reasoned and entitled to full weight.

Dr. Repsher diagnosed Claimant with a mild restrictive pulmonary disease and opined that his respiratory condition is not caused by or aggravated by coal dust. He concluded that Claimant's pulmonary impairment is caused by his heart disease. However, Dr. Repsher failed to discuss whether Claimant was totally disabled and able to perform his previous coal mine employment based on his pulmonary impairment. I find Dr. Repsher's opinion to be incomplete regarding the issue of total disability and entitled to less probative weight.

Based upon the above, I find Dr. Powell's opinion does not support a finding of total disability, while the opinion of Dr. Lockey does. Additionally, I find that Dr. Rephser's opinion is incomplete regarding the issue of total disability. Therefore, in weighing all of this evidence, Claimant has failed to establish that he has a totally disabling respiratory impairment by a preponderance of the evidence under Section 718.204(b)(2)(iv).

In sum, the record contains one qualifying pulmonary function study that I found not to be a true representation of Claimant's current pulmonary condition; two non-qualifying pulmonary function studies; no qualifying arterial blood gas studies; no evidence of cor pulmonale with right-sided congestive heart failure; and three medical narratives that, in total, do not support a finding of total disability. Therefore, I find that Claimant has not established that he is totally disabled due to a respiratory or pulmonary impairment under Section 718.204(b)(2).

In conclusion, Claimant has failed to establish by a preponderance of the evidence that he has pneumoconiosis, that he is totally disabled, and that his disability is due to pneumoconiosis. Accordingly, this claim must be denied.

ORDER

The claim of Marvin Ray Brown for benefits under the Act is hereby **DENIED.**

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RUDOLF L. JANSEN
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).